

providers migrate to a VoIP-based architecture, these lines are no longer required to be included in the Commission's report, and it is likely that the report increasingly understates competition from cable providers.

Similarly, the Colorado Public Utilities Commission ("COPUC") offers market share data for the Denver MSA, concluding that the competitive facilities-based market share in the Denver MSA is only 5.2%.<sup>64</sup> However, this percentage may be based on traditional circuit-switched telephony, and likely does not include consideration of any Comcast CDV lines in the Denver MSA. In the same vein, the Colorado Office of Consumer Counsel ("Colorado OCC") has conducted a survey that claims Comcast holds 6.2% of the residential voice market in the Denver metro area. It is not clear whether Comcast VoIP-based CDV customers are included in the survey.<sup>65</sup> Finally, the survey was conducted over a year ago, and there is little doubt that Comcast's aggressive marketing campaign has resulted in a significant increase in its share of the local telephone market since that time.

COMPTEL and the Colorado OCC have apparently misunderstood the nature of Comcast's migration to CDV. These parties note that on August 24, 2007, Comcast filed an application with the Colorado Commission to "Discontinue the Provision of Residential

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modifications to the Form 477, in November 2004, it rejected suggestions that it add questions soliciting information about local telephone service as provided by entities exclusively utilizing VOIP. The Commission noted that entities that are filing local telephone service information on Form 477 may already include information about VOIP service in their filings."

[http://www.fcc.gov/broadband/broadband\\_data\\_faq.html#exemptions](http://www.fcc.gov/broadband/broadband_data_faq.html#exemptions) (visited Sept. 18, 2007).

<sup>64</sup> COPUC at 29.

<sup>65</sup> Furthermore, this survey must be viewed with caution, as it represents a sample of only 276 customers in a "metro area" that includes customers in the counties of "Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas and Jefferson" Colorado OCC at Exhibit 2, page 35. Boulder County is not in the Denver MSA.

Facilities-based Circuit-switched Telecommunications Services.” COMPTEL<sup>66</sup> originally claimed that based on this filing “Comcast is not a competitor in these communities [in the Denver MSA] and may not be factored into the forbearance analysis.” COMPTEL later withdrew that argument.<sup>67</sup> The Colorado OCC<sup>68</sup> gleefully notes that “[t]his is poor timing for Qwest’s petition and on its heavy reliance on the competitive threat from Comcast Phone of Colorado (the landline arm of Comcast).” Incredibly, the OCC states that “all of these customers have been migrating to some other carrier and will continue to migrate, and given that Qwest is, by far, the best known local carrier with the largest market share, it is a safe and non-rebuttable presumption that a simple majority -- if not more -- of these customers will end up at Qwest.”<sup>69</sup> Obviously, the Colorado OCC has completely misinterpreted the situation in Denver. Comcast is not exiting the local phone market: it is simply eliminating its circuit-switched technology and proactively migrating its customers to its VoIP-based voice offering.

The fact that cable voice service is available to the overwhelming majority of homes in each MSA provides competitive discipline throughout the MSA. If cable voice service is available to a large percentage of homes, it clearly can be made available to the rest, and the prospect of this occurring constrains Qwest’s pricing for all customers in the MSA, including those without current access to cable voice services, assuming Qwest could identify such locations.

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<sup>66</sup> COMPTEL at 39.

<sup>67</sup> Ex parte letter from Mary C. Albert, COMPTEL to Marlene H Dortch, dated Oct. 1, 2007.

<sup>68</sup> Colorado OCC at 22 and 23.

<sup>69</sup> *Id.* at 23.

In sum, there is no credible evidence contradicting Qwest's showing that the major cable providers serve the vast majority of the geographic area within the MSAs at issue, offer voice service throughout the majority or all of their service territories, and are experiencing an enviable growth rate. As Qwest's opponents well know, the data on which the Commission relied to perform a more granular analysis in Omaha and Anchorage were obtained from the cable operators themselves because only those entities have access to precise information on the availability of their voice services.<sup>70</sup> The fact that these companies have generally chosen not to provide this information here -- despite their knowledge that the Commission has requested these data in the past -- is strong evidence that the data would be unfavorable to their arguments in this proceeding. To the extent that the Commission believes it needs this data to evaluate Qwest's request, it should require the cable companies to produce it.

## 2. Wireless

In both the *Omaha Forbearance* and *Anchorage Forbearance Orders*, the Commission found that competition from cable alone was sufficient to justify forbearance, without even looking at other sources of competition. The Commission then concluded that it lacked sufficiently granular detail to determine the extent of substitution between wireless and wireline services in the MSAs at issue.<sup>71</sup> Qwest provided information in each of its four petitions more than sufficient to overcome the Commission's concerns. This information included maps and other data indicating that wireless services were widely available from multiple providers

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<sup>70</sup> *Anchorage Forbearance Order*, 22 FCC Rcd at 1975-76 ¶ 28; *Omaha Forbearance Order*, 20 FCC Rcd at 19430 ¶ 28.

<sup>71</sup> *Anchorage Forbearance Order*, 22 FCC Rcd at 1976 ¶ 29; *Omaha Forbearance Order*, 20 FCC Rcd at 19452 ¶ 72.

throughout each of the four MSAs,<sup>72</sup> evidence that each of the wireless carriers offered packages of services that compete with Qwest's service for comparable offerings, and evidence that large and growing numbers of customers in each MSA were using wireless service in place of traditional wireline service.<sup>73</sup>

As Qwest demonstrated in its forbearance petitions and in the Brigham/Teitzel declarations, many customers have already "cut the cord" and there is evidence that a significant number of customers are likely to "cut the cord" in the future. In fact, new data from the National Center for Health Statistics -- the research source for the data relied on by the Commission to assess wireless substitution -- show that the rate at which U.S. households "cut-the-cord" continues to increase. The rate is 12.8% of all U.S. households as of December 2006.<sup>74</sup>

Despite this information, several commenters have argued that wireless service is a "complement" to wireline service, rather than a "substitute," and therefore, they argue that competition from wireless carriers should not be considered in a forbearance analysis, without regard to the fact that the proportion of wireless subscribers who have "cut the cord" is significant and the trend of "cord cutting" is continuing its inexorable upward trend.<sup>75</sup> They

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<sup>72</sup> Denver Brigham/Teitzel Declaration ¶ 39 and n.116 and Denver Brigham/Teitzel Declaration at Exhibit 5, page 7; Seattle Brigham/Teitzel Declaration ¶ 39 and n.104 and Seattle Brigham/Teitzel Declaration at Exhibit 5, page 11; Minneapolis Brigham/Teitzel Declaration ¶ 42 and n.121 and Minneapolis Brigham/Teitzel Declaration at Exhibit 5, page 7; Phoenix Brigham/Teitzel Declaration ¶ 42 and n.91 and Phoenix Brigham/Teitzel Declaration at Exhibit 5, page 5.

<sup>73</sup> Denver forbearance petition at 11-13 and Denver Brigham/Teitzel Declaration ¶¶ 37-38; Seattle forbearance petition at 11-14 and Seattle Brigham/Teitzel Declaration ¶¶ 40-41; Minneapolis forbearance petition at 11-15 and Minneapolis Brigham/Teitzel Declaration ¶ 42; Phoenix forbearance petition at 11-14 and Phoenix Brigham/Teitzel Declaration ¶¶ 38-39.

<sup>74</sup> See: <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200705.pdf> (visited September 28, 2007).

<sup>75</sup> See, e.g., COPUC at 21; COMPTTEL at 43; Cox at 11-12; Covad at 32-35; Affinity at 23-24.

argue that in order for the Commission to consider wireless competition in its forbearance analysis, Qwest must demonstrate that wireless is a "full substitute" or "complete substitute" for wireline service.<sup>76</sup> Other parties argue that the Commission should not consider wireless competition in this forbearance petition because it did not consider wireless in its *Omaha Forbearance Order*.<sup>77</sup>

Arguments that wireless needs to be a perfect substitute for wireline miss the mark entirely. The fact is competition from wireless carriers is having a significant impact on the local exchange telephone market in all four MSAs, as demonstrated in Qwest's forbearance petitions. Wireless service does not need to be a *perfect substitute* for wireline service in order for it to serve as an *effective substitute* for wireline services that constrains Qwest's retail wireline prices. As the Commission has recognized, if a price increase in Qwest local exchange service will cause a significant number of its customers to replace their wireline service with wireless service, thus reducing wireline profits, this has a price constraining effect on Qwest.<sup>78</sup> In other words, if there are enough customers who will substitute a wireless phone for their wireline service if Qwest raises prices, this constrains Qwest's ability to increase wireline prices.

This point is demonstrated by the survey data provided by the Colorado OCC, which stated that a \$5 increase in Qwest's wireline phone rates would cause 19% of residential respondents to replace their wireline phone with a wireless phone, and a \$10 increase would cause another 16% (35% total) of residential respondents to replace their wireline phone with a

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<sup>76</sup> COMPTTEL at 43; Covad at 33; Affinity at 23.

<sup>77</sup> See, e.g. Cox at 11; Affinity at 23.

<sup>78</sup> See *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18482-83 ¶ 91 (2005).

wireless phone.<sup>79</sup> This demonstrates that the availability of wireless service constrains Qwest's ability to raise wireline prices.

The Colorado OCC attempts to show that almost no customers in the Denver metropolitan area have "cut the cord." They state that their survey shows that "only 1 out of 255 Metro Denver area households surveyed had completely cut the cord, or 0.4%."<sup>80</sup> On examination, it is clear that this flawed conclusion, which is inconsistent with all other wireless substitution data, is based on the methodology employed in the study. The study methodology states that the customers in the survey "were selected by random-digit dialing from a list of telephone exchanges of Qwest customers and other telephone companies within Qwest's service territory."<sup>81</sup> Thus, it is clear that the survey methodology limited the survey population to households that have wireline "exchange" service, or at best have wireless service using a number ported out from a wireline carrier. This is like asking the population of people who have recently bought prime rib in Denver how many of them are not meat-eaters in order to determine the percentage of vegetarians that live in Denver; one would expect the population to be very low due to the flawed methodology. The Commission should disregard this "data" from the Colorado OCC.<sup>82</sup>

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<sup>79</sup> Colorado OCC at Exhibit 2, page 10.

<sup>80</sup> *Id.* at 16.

<sup>81</sup> *Id.*, Exhibit 2, page 2.

<sup>82</sup> The Colorado OCC also argues that wireless cannot be a substitute for wireline services, because based on their survey, 81% of wireline customers in the Denver metro area are also wireless customers. Colorado OCC at 12. Thus, they appear to believe that in order for a service to be a substitute, a customer cannot have both services. This, of course, is absurd. This is like saying that if a person has both sliced ham and sliced turkey in the refrigerator, then these foods cannot be looked at as substitutes for each other. However, for most people, when making a sandwich, ham and turkey would be viewed as effective substitutes, even though they are not identical.

Affinity argues that Qwest should have provided wireless data at a level of granularity that would allow a wire center-based analysis.<sup>83</sup> However, the fact is that wireless providers do not view the market on a "wire center" basis -- in fact wire centers are not meaningful to wireless providers, who tend to market their services by much larger geographic units, such as an entire metropolitan area.<sup>84</sup> In fact, wireless providers generally do not track data by wire center, so it is not rational to require a wire center-based analysis of wireless data.

Some commenters also argue that Qwest has not provided meaningful wireless data even at the MSA level.<sup>85</sup> Of course Qwest does not have detailed MSA-wide subscriber data for each of its wireless competitors, and therefore cannot provide a detailed "market share" analysis. Only these wireless competitors have this information. Nonetheless, Qwest has provided a significant and convincing set of evidence to demonstrate that wireless services represent a significant form of competition to Qwest's wireline service in the four MSAs. The Commission should consider this data, as well as data from its own reports, such as the *Local Competition* Report, which show that wireless lines now exceed wirelines by a significant margin in all four states in which the MSAs in this case are located.<sup>86</sup> There is no doubt wireless competition is significant and growing in each of the four MSAs.

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<sup>83</sup> Affinity at 23.

<sup>84</sup> A wireless carrier's local calling area is not based on Qwest exchanges, but Commission-defined Major Trading Areas.

<sup>85</sup> Covad at 35; Cox at 13; Colorado OCC at 11.

<sup>86</sup> *Local Telephone Competition: Status as of June 30, 2006*, Industry Analysis and Technology Division, Wireline Competition Bureau, January 2007, Tables 7 and 14.

### 3. Over the Top VoIP

In both the *Omaha Forbearance* and *Anchorage Forbearance Orders*, the Commission concluded that it lacked sufficiently granular detail to determine the extent of substitution between over the top VoIP and wireline services in the MSAs at issue.<sup>87</sup> However, Qwest has shown the explosive growth in VoIP-enabling broadband access in each of the states in which the four MSAs are located.<sup>88</sup> Qwest has also shown the availability of WiFi service to carry VoIP calls.<sup>89</sup>

Several commenters argue that VoIP-based services should not be considered by the Commission in this proceeding because VoIP-based services allegedly do not represent a substitute for wireline services. These parties argue that the Commission has rejected the consideration of VoIP in previous proceedings, and therefore should do so in this forbearance proceeding.<sup>90</sup> Essentially, they allege that:

- VoIP is a complement to wireline service, not a substitute;<sup>91</sup>
- Qwest has not provided sufficient evidence to show VoIP is a substitute for wireline services;<sup>92</sup>
- Qwest has “double counted” VoIP lines;<sup>93</sup> and

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<sup>87</sup> *Anchorage Forbearance Order*, 22 FCC Rcd at 1976 ¶ 29; *Omaha Forbearance Order*, 20 FCC Rcd at 19452 ¶ 72.

<sup>88</sup> Denver forbearance petition at 14-16; Seattle forbearance petition at 14-16; Minneapolis forbearance petition at 15-17; Phoenix forbearance petition at 14-16.

<sup>89</sup> Denver forbearance petition at 15 and Denver Brigham/Teitzel Declaration ¶ 40 and Exhibit 5, page 8; Seattle forbearance petition at 15-16 and Seattle Brigham/Teitzel Declaration ¶ 43 and Exhibit 5, page 5; Minneapolis forbearance petition at 16 and Minneapolis Brigham/Teitzel Declaration ¶ 43 and Exhibit 5, page 8; Phoenix forbearance petition at 15 and Phoenix Brigham/Teitzel Declaration ¶ 40 and Exhibit 5, page 12.

<sup>90</sup> Affinity at 25; COMPTTEL at 43; Cox at 14.

<sup>91</sup> Cox at 11-12; Affinity at 27.

<sup>92</sup> COMPTTEL at 42; Colorado OCC at 29; Affinity at 25.



- VoIP is not a true facilities-based alternative.<sup>94</sup>

VoIP-based services -- just like wireless services -- *do* represent an effective substitute for wireline services in all four MSAs, and many customers are turning to VoIP-based services to meet their voice service needs as demonstrated in Qwest's forbearance petitions. Like wireless services, VoIP-based services do not need to represent *perfect substitutes* for wireline service in order to serve as an *effective substitute* for wireline services that constrains Qwest's retail wireline prices. While VoIP-based services may not be perceived to be a substitute for Qwest telephone service by all wireline customers at this time, it is viewed as a substitute by many customers, as demonstrated in Qwest's forbearance petitions. If prices for Qwest local exchange service increase, a significant number of its customers will replace their wireline service with VoIP-based service, thus reducing wireline profits. This has a price constraining effect on Qwest.

Recent data confirms that VoIP is growing in the consumer market. According to the latest study by Yankee Group, consumer VoIP services (from cable and "over-the-top" providers) have now reached over nine million subscribers and have penetrated 9% of households, up from 4% the previous year.<sup>95</sup> Net additions increased by 175% in 2006.<sup>96</sup> Earlier in these reply comments, and in its petitions, Qwest demonstrated the rapid growth of cable VoIP competition.

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<sup>93</sup> Colorado OCC at 30; Covad at 38.

<sup>94</sup> Time Warner at 26; Covad at 37-38.

<sup>95</sup> *Growing Pains Persist in Adolescent Market: Yankee Group's 2007 US Consumer VoIP Subscriber Forecast*, Yankee Group, July, 2007.

<sup>96</sup> *Id.*

While some commenters in this proceeding have highlighted the recent troubles of some “over-the-top” VoIP providers and cited the bankruptcy of SunRocket in July,<sup>97</sup> the Yankee Group reports that “As much as the pundits would like to declare the death of Vonage and broadband (“over-the-top”) VoIP, the space is still alive.”<sup>98</sup> The Yankee Group also notes that despite the bankruptcy of SunRocket, “the broadband (“over-the-top”) market continues to see new entrants that are bringing innovative solutions with them” such as Omaha. Despite the challenges “over the top” VoIP providers face, “the space will continue to grow, albeit slower than previous years because of increased competition.”<sup>99</sup> On the small business side, according to Dell’Oro Group, one quarter of small business lines are now VoIP-based, with a 30% growth in second quarter 2007 versus second quarter 2006.<sup>100</sup>

Several commenters argue that Qwest has not provided the granular data necessary to demonstrate that VoIP-based services are a substitute for traditional wireline services in the four MSAs. For example, COMPTTEL states that Qwest “cites statistics for statewide broadband subscribership and analysts’ estimates of projections of VoIP penetration nationwide” and proclaims that this data is “completely unreliable.”<sup>101</sup> The Colorado OCC notes that Qwest has not provided evidence “specific to the Denver-Aurora MSA” regarding the inroads made by VoIP providers.<sup>102</sup> Of course, Qwest does not have detailed MSA-wide subscriber data for each

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<sup>97</sup> See, e.g., Cox at 15.

<sup>98</sup> *Id.*

<sup>99</sup> See note 95, *supra*.

<sup>100</sup> See: [http://telephonyonline.com/voip/technology/voice\\_lines\\_ip\\_081607/](http://telephonyonline.com/voip/technology/voice_lines_ip_081607/) (visited September 28, 2007).

<sup>101</sup> COMPTTEL at 43.

<sup>102</sup> Colorado OCC at 29.

of its VoIP-based competitors, and therefore cannot provide a detailed "market penetration" analysis. Only the VoIP competitors have this information. Nonetheless, despite this handicap, Qwest has provided a significant and convincing set of evidence to demonstrate that VoIP-based services represent a significant form of competition to Qwest's wireline service. It is beyond dispute that any customer with an existing broadband Internet connection (or ready access to one) now has the option to subscribe to VoIP telephone service as a direct alternative to traditional circuit-switched telephone service.

Some commenters argue that Qwest has "double-counted" VoIP lines.<sup>103</sup> They argue that since "over-the-top" VoIP providers use transport and loops from other providers, Qwest has accounted for these lines elsewhere in its petitions and therefore, the inclusion of VoIP in the analysis would represent a "double counting" of these "lines." This is an erroneous argument, as there is no "double counting" of lines in Qwest's analysis. Certainly "over-the-top" VoIP requires a broadband connection from some carrier, whether it be the cable company, a wireless provider, a CLEC, or some other provider. This does not mean that the Commission should ignore the VoIP side of the equation. It is disingenuous for these parties to argue that Qwest is "double counting" when Qwest has not provided -- and is not capable of providing -- any specific counts of these supposedly "double counted" lines.

In a similar vein, Covad argues that "over-the-top" VoIP services do not represent facilities-based competition because they "ride the facilities of another provider."<sup>104</sup> It is certainly true that VoIP services require a broadband connection. However, there is no question that VoIP services provided over broadband represents a facilities-based alternative to traditional

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<sup>103</sup> Covad at 38; Colorado OCC at 30.

<sup>104</sup> Covad at 37; Time Warner at 26.

voice services. If a customer has VoIP-based service provided over a broadband line, whether it is cable, DSL or another broadband technology, he or she can use that service as a substitute for Qwest wireline voice telephone service. The customer need not purchase a Qwest phone line in order to receive VoIP-based service, and in many cases no Qwest facilities may be used at all.

The Colorado OCC attempts to use its market survey to show that VoIP-based services are not a substitute for traditional wireline service. They state that only 18% of respondents agreed that they preferred VoIP-based services over traditional telephone service, and erroneously conclude that this somehow provides evidence that the services are not substitutes.<sup>105</sup> However, this in no way indicates that the services are not substitutes. Whether 80%, 50% or 20% of respondents "prefer" VoIP service is not a determinant of whether the two services are substitutable. The Colorado OCC almost seems to be implying that true substitutes would have a 50% to 50% preference, which of course is not a test for substitutability. If one service is price constraining on the other service, they are substitutes, regardless of the "preference" level. In addition, the survey question simply asks for a generic preference, without stating a price for each alternative.

#### **4. Wholesale Alternatives**

In both the *Omaha Forbearance Order* and the *Anchorage Forbearance Order*, the Commission relied in part on competitors' ability to use the ILEC's wholesale offerings pursuant to the provisions of Sections 251 and 271, from which the Commission did not forbear. The Commission recognized that an ILEC facing facilities-based competition has the incentive to make attractive wholesale offerings available so that it will derive some revenue indirectly from retail customers who choose a retail provider other than Qwest, rather than losing the entire

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<sup>105</sup> Colorado OCC at 27.

revenue stream to a competitor using 100% of its own network facilities to deliver services to its customer.<sup>106</sup> The D.C. Circuit upheld this determination, explaining that in the *TRRO* the Commission “explicitly recognized that an ILEC’s tariffed offerings could, in certain circumstances, be an avenue for competitive entry.” and that the Commission was reasonable to conclude those circumstances were met given “the combination of tariffed ILEC facilities and facilities-based competition.”<sup>107</sup> The Commission has previously rejected arguments that a fully competitive wholesale market is a mandatory precursor to finding that Section 10(a)(1) is satisfied.<sup>108</sup>

Thus, in the *Omaha Forbearance Order* the Commission has rejected arguments made by some commenters here,<sup>109</sup> that forbearance creates a cable-Qwest duopoly. Instead, the Commission found that there is actual and potential competition from established competitors relying upon wholesale access rights and other rights from the Sections of 251(c) and 271, from which the Commission does not forbear.<sup>110</sup> Consistent with these findings, Qwest demonstrated that it is making attractive wholesale offerings available in each of the four MSAs. Competitors in each MSA also continue to resell Qwest’s service pursuant to Section 251(c)(4). Qwest has previously provided wire-center specific data showing the number of residential lines

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<sup>106</sup> *Omaha Forbearance Order*, 20 FCC Rcd at 19448-49 ¶ 67.

<sup>107</sup> *Qwest Corp v. FCC*, 482 F.3d at 480.

<sup>108</sup> *Omaha Forbearance Order*, 20 FCC Rcd at 19452 ¶ 71.

<sup>109</sup> *Id.* at 19446 n.162.

<sup>110</sup> *See id.* at 19452 ¶ 71.

competitors are serving using Performance Assurance Plan/ Qwest Local Service Platform ("QPP/QLSP"), unbundled loops, and resale.<sup>111</sup>

Affinity and the Arizona Corporation Commission ("ACC") suggest that the Commission should limit itself to *TRRO* guidelines in order to determine where UNE relief is warranted.<sup>112</sup> There is no such requirement, and Affinity provides no grounds for such a limitation. In its *Omaha Forbearance Order* the Commission noted that its *TRRO* decision left open the possibility that it "might one day be appropriate to conclude, based upon sufficient facilities-based competition, particularly from cable companies, that the state of local exchange competition might justify forbearance from UNE obligations."<sup>113</sup> In upholding the *Omaha Forbearance Order*, the D.C. Circuit recognized that the *TRRO* did not constitute a limitation on unbundling relief.<sup>114</sup> Moreover, the ACC argues that this Commission should not forbear based upon "benefits to CLECs that are currently dependant upon Qwest UNEs."<sup>115</sup> Providing benefits to a certain class of competitors is not part of the forbearance standard.

Commenters in this proceeding contend that resale is not a viable alternative to UNEs and should be disregarded as competitive evidence.<sup>116</sup> However, the commenters miss the point. Resale is currently used as a competitive option, and it will continue to be available as a

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<sup>111</sup> See Denver Brigham/Teitzel Declaration at highly confidential Exhibit 2; Seattle Brigham/Teitzel Declaration at highly confidential Exhibit 2; Minneapolis Brigham/Teitzel Declaration at highly confidential Exhibit 2; Phoenix Brigham/Teitzel Declaration at highly confidential Exhibit 2.

<sup>112</sup> See Affinity at 65-66; Arizona at 17-19.

<sup>113</sup> See *TRRO*, 20 FCC Rcd at 2556-57 ¶¶ 38-39 and n.116.

<sup>114</sup> See, e.g., *Qwest v. FCC*, 482 F.3d at 480.

<sup>115</sup> Arizona at 19.

<sup>116</sup> See, e.g., Affinity at 76-77.

competitive option, constraining Qwest's retail pricing, terms and conditions, regardless of whether UNEs remain available in a particular market. Thus, the Commission should consider resale as an ongoing competitive factor when it considers Qwest's forbearance petitions.

Other commenters argue in favor of maintaining Section 251 unbundling in order to retain Qwest's Change Management Process ("CMP"), Performance Indicators ("PID") and the PAP.<sup>117</sup> These items do not provide an adequate reason to retain Section 251 unbundling. All three are elements of a Section 251 offering, but there is no requirement for them under Section a 271 offering. The CMP was entered into in the Section 271 workshop proceedings, but as part of Qwest's duty under checklist item 2, which is to comply with Sections 251 and 252.<sup>118</sup> PIDs are performance indicators for Operational Support Systems, which are a Section 251 UNE, and as such measure order processing, installation and repair services performance.<sup>119</sup> The PAP is a wholesale performance assurance plan that measures compliance with Qwest's obligations under Section 251 of the Act and provides payments to CLECs when Qwest does not meet its performance requirements.<sup>120</sup> While Qwest's commercial agreements do not include CMP/PID/PAP, Qwest has incorporated performance metrics into commercial agreements.

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<sup>117</sup> See, e.g., Washington at 14-15.

<sup>118</sup> See, e.g. *In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, Inter LATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, Memorandum Opinion and Order, 17 FCC Rcd 26303, 26832-33 ¶¶ 40-42 (2002).

<sup>119</sup> See, e.g., Nebraska PSC Application No. C-1830 Order ¶ 4.

<sup>120</sup> Cf. *In the Matter of Application by Verizon New England Inc., Verizon Delaware Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, Inter LATA Services in New Hampshire and Delaware*, Memorandum Opinion and Order, 17 FCC Rcd 18660, 18664-65 ¶ 7 (2002) ("PAP to monitor Verizon-Delaware wholesale performance and encourage Verizon-Delaware to continue to meet its obligations under section 251 of the Act").

Moreover, Qwest has agreed to report service quality metrics for its special access services to the Commission "to help ensure that Qwest provides special access services to unaffiliated entities in a non-discriminatory manner."<sup>121</sup>

Various commenters in this proceeding contend that Qwest will be free to raise its wholesale prices and/or reduce its retail prices to such a degree that a "price squeeze" will be created, forcing competitors to exit the market.<sup>122</sup> For example, Time Warner states that:

Based on the conservative assumption that the elimination of unbundling would cause Qwest to require that Eschelon pay Qwest's special access prices for DS-1 loops applicable under Qwest's standard discount plan and Qwest's post-forbearance Omaha price for DS-0 loops, Eschelon determined that it would be placed in an unsustainable price squeeze.<sup>123</sup>

However, Time Warner does not explain why the market facts in the four MSAs support the notion of a price squeeze. The generally accepted economic explanation of a price squeeze, is that a "price squeeze occurs when a firm with monopoly power on the primary, or wholesale level, engages in a prolonged price increase that drives competitors out of the secondary, or retail level, and thereby extends its monopoly power to the secondary market."<sup>124</sup>

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<sup>121</sup> *Qwest Nondominance Order*, 22 FCC Red at 5240 ¶ 64.

<sup>122</sup> COPUC at 12; EarthLink, Inc. and New Edge Network, Inc. ("EarthLink") at 25, Time Warner at 6, 41, 43, 44. Time Warner claims that Qwest has already created a price squeeze by "offering a promotional retail rate of \$461 for a DS-1 EEL." Time Warner at 44. However, Time Warner offers no further details regarding reasons why it believes this price creates a price squeeze, and it is simply incorrect with respect to the service to which this price applies. In fact, the referenced promotional price was not applicable to "a DS-1 EEL" at all, but rather, to Digital Switched Services ("DSS") which is a retail local digital trunk facility provided to serve digital PBX equipment.

<sup>123</sup> Time Warner at 6.

<sup>124</sup> *The Price Squeeze Doctrine Still Viable in Fully-Regulated Energy Markets?*, Lawrence J. Spiwak, 1993.



First, Qwest does not have a monopoly in the wholesale market in any of the four MSAs. In Phoenix, Cox offers its wholesale carrier access services to other carriers.<sup>125</sup> As part of the recent CLEC consolidation, Integra now includes Eschelon and the network fiber assets of Electric Lightwave ("ELI"), which provides carriers in the MSAs with wholesale loop and transport alternatives to Qwest's network. Eschelon (one of the commenters complaining of a potential price squeeze) was strangely silent with regard to the fact that it now is able to leverage its own company's network in lieu of services purchased from Qwest wherever ELI's facilities are deployed. It was also silent with regard to network services it may now purchase (should ELI's facilities not be deployed in a particular area) from other carriers such as Level 3, XO, Time Warner, and others. Thus, Qwest is not a monopolist in the wholesale market in the four MSAs, which means that Qwest cannot institute a price squeeze. Moreover, even if Qwest were a monopolist in the wholesale market (which it is not), given the competition from cable, wireless, and over-the-top VoIP, Qwest would be foolish to attempt to implement a price squeeze since those competitors are not at all dependent upon Qwest's loops and could easily win the retail customers that would otherwise have chosen the "squeezed" CLEC.

A number of the commenters in this proceeding assert that Qwest's "unreasonable" wholesale pricing practices in the nine Omaha MSA wire centers for which the Commission granted Section 251 forbearance have caused McLeod to consider exiting the Omaha market.<sup>126</sup>

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<sup>125</sup> See: [http://www.coxbusiness.com/systems/az\\_phoenix/index.html](http://www.coxbusiness.com/systems/az_phoenix/index.html) (visited September 28, 2007).

<sup>126</sup> COMPTTEL at 18, 25-29; COPUC at 3; BT Americas at 13; Covad at 5, 21, 47; EarthLink at 26; Time Warner at 12, 41; ACC at 13, 20, 21; Affinity at 12, 46-52; National Association of State Utility Consumer Advocates ("NASUCA") at 5; Cox at 25. Some commenters also rely upon ARMIS filings to show that Qwest earns an unreasonable rate of return on special access. Qwest has addressed such arguments in its comments and reply comments in WC Docket 05-25, and incorporates that discussion here.

McLeod's complaint, which is the subject of a separate Commission docket, should not be relitigated here. Basically, McLeod is threatening to leave the Omaha market unless the Commission overturns the *Omaha Forbearance Order* and makes UNEs available at TELRIC rates in the nine Omaha wire centers. It is difficult to say what actions McLeod may take in Omaha or how its proposed acquisition by PAETEC will affect its business strategy, but to date, McLeod has not exited the Omaha market.

On August 29, 2007, Qwest filed its opposition to the McLeod petition, and the accompanying Teitzel declaration in WC Docket No. 04-223. Qwest incorporates those papers by reference here. The following points that Qwest made in that proceeding bear mentioning:

- Since the grant of the *OFO*, Qwest's retail access line loss in the nine *OFO* wire centers has actually accelerated.<sup>127</sup>
- Qwest's rate of retail line loss in the nine *OFO* wire centers is nearly identical to line loss in the remaining Omaha wire centers where UNEs remain available.<sup>128</sup>
- Qwest's DS0, DS1 and DS3 service prices available to McLeod fully satisfy Section 271 pricing requirements.<sup>129</sup>
- Cox Communications offers alternative loop services to other carriers in the Omaha market.<sup>130</sup>
- The Regional Commitment Program ("RCP") requires only that a carrier continue to purchase 90% of its current level of special access circuits. It does not require that the carrier purchase a minimum of 90% of its total Qwest-provided DS1s and DS3s as special access.<sup>131</sup>

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<sup>127</sup> Opposition of Qwest Corporation, WC Docket No. 04-223, filed Aug. 29, 2007 at Declaration of David L. Teitzel ¶ 4.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* ¶ 14.

<sup>130</sup> *Id.* ¶ 8.

<sup>131</sup> Opposition of Qwest Corporation, WC Docket No. 04-223, filed Aug. 29, 2007 at Declaration of Thomas Cogan ¶ 4.

In this regard, it is worth noting McLeod's ever-shifting descriptions of its problems in Omaha. In this proceeding, the Affinity commenters (which include McLeod) flatly state that Qwest "is the only wholesale loop provider in Omaha."<sup>132</sup> Yet, in the Omaha docket, McLeod admits that Cox *does* offer wholesale access to loops in Omaha, while complaining that Cox does not offer loops to every building in Omaha to which McLeod would like access.<sup>133</sup>

Further, these commenters complain that the Commission erred in the Omaha docket when it decided that competition from Cox was sufficient to justify forbearance in wire center service areas where Cox is willing and able within a commercially reasonable time of providing service to 75 percent of end user locations accessible from that wire center."<sup>134</sup> These commenters argue that not only are wholesale alternatives not available to reach customers, but they also argue that it may be prohibitively expensive to construct "laterals" to connect buildings to their network.<sup>135</sup> However, when speaking to the press about McLeod's fiber, McLeod's president Royce Holland crow's that it is easy to connect a building when McLeod's fiber is nearby:

A lot of our metro fiber is in places like Chicago, Minneapolis, St. Paul, Michigan," Holland said. "Most of the buildings we have on that fiber are collocation centers -- ILEC central offices and carrier hotels. One thing we haven't done is put lot of that fiber in office buildings, because our business been the small and medium enterprise business. That doesn't mean we couldn't light a lot of buildings throughout the Midwest. That's one of the potential upside

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<sup>132</sup> Affinity at 48.

<sup>133</sup> See McLeodUSA Telecommunications Services, Inc. Reply to Opposition, WC Docket No. 04-223, filed Sept. 13, 2007 ("McLeodUSA") at 3. See also COMPTel at 8; Affinity at 10, 56; Time Warner at 14-16, 17-25. McLeod also complains that the Cox loops are a higher capacity than McLeod wants. McLeodUSA at 3.

<sup>134</sup> *Omaha Forbearance Order*, 20 FCC Rcd at 19450-51 ¶ 69.

<sup>135</sup> See Affinity at 41.

advantages of getting together with PAETEC. Our fiber can be useful for that. It's easy enough to get into a manhole and get the fiber into a building.<sup>136</sup>

The bottom line is that McLeod apparently has one set of facts for the Commission when advocating to maintain or re-impose unbundling obligations on its ILEC competitor and a different set of facts for its investors and the public.

## 5. Decline in Qwest's Retail Lines

The Commission has consistently held that in a dynamic market, historic measures of static market share are not especially meaningful in a competitive analysis.<sup>137</sup> In the *Omaha Forbearance* and *Anchorage Forbearance Orders*, the Commission focused on the facilities coverage of competitors, rather than on the number of customers that competitors were already serving over those facilities.<sup>138</sup> In any event, Qwest has provided evidence in its forbearance petitions that its retail switched access lines are declining due to competition, despite increases in the number of households in each MSA.<sup>139</sup>

A number of commenters claim that Qwest has misrepresented its retail access line losses in Table 1 of the Brigham/Teitzel declarations in each of the four forbearance petitions. They contend that much of the line loss Qwest identified as occurring between December 2000 and December 2006 can be attributed to a large number of Qwest customers replacing additional lines (used for dial-up Internet access) with DSL broadband Internet service purchased from

<sup>136</sup> See: [http://telephonyonline.com/access/news/paetec\\_acquires\\_mcleodusa\\_091707/](http://telephonyonline.com/access/news/paetec_acquires_mcleodusa_091707/) (visited September 21, 2007).

<sup>137</sup> See note 23, *supra*.

<sup>138</sup> *Omaha Forbearance Order*, 20 FCC Rcd at 19432 ¶ 36; *Anchorage Forbearance Order*, 22 FCC Rcd at 1977-79 ¶¶ 31-34.

<sup>139</sup> Denver forbearance petition at 17-18 and Denver Brigham/Teitzel Declaration ¶ 5; Seattle forbearance petition at 6-7 and Seattle Brigham/Teitzel Declaration ¶ 5; Minneapolis forbearance petition at 18 and Minneapolis Brigham/Teitzel Declaration ¶ 5; Phoenix forbearance petition at 17-18 and Phoenix Brigham/Teitzel Declaration ¶ 5.

Qwest.<sup>140</sup> The commenters are wrong. The DSL customer gains Qwest has realized have been overwhelmingly due to customers adding DSL to existing Qwest service rather than substituting DSL service for an additional line.

While Qwest does not maintain a standard tracking process to quantify the conversion of additional lines to DSL, especially at the MSA level, Qwest developed a special study for each of the four MSAs, which analyzes the proportion of Qwest's retail residential access lines that had been disconnected between December 2000 and December 2006 in favor of DSL service.<sup>141</sup> This study first examined each and every residential customer in each of the four MSAs that had added Qwest DSL service in any month between those two points in time, then examined those same accounts to determine whether an additional line had been removed in that same month, or in the month immediately following the DSL addition. This study confirmed that the great majority of DSL additions for residential customers are, indeed, "upsells" rather than conversions of access lines to DSL service. The following confidential table summarizes these results:

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<sup>140</sup> Covad at 14, 24; Affinity at 19; Selwyn at 4; NASUCA at 4; Cox at 12.

<sup>141</sup> This was a very extensive special study for the residential market, involving massive amounts of data, examination of individual customer records and long systems processing time. In the limited time available to develop replies, Qwest was not able to conduct a similar study for the business market. In addition, such a study in the business market is significantly more complicated, since business customers often have multiple billing numbers and locations. However, Qwest believes the main focus of the commenters' criticism of Qwest's line loss data was focused on the residential market, and that the data Qwest offers here is responsive to -- and effectively rebuts -- those criticisms.

-----Begin Confidential-----  
 (all data for period of 12/00 through 12/06)

<u>MSA</u>	(A) Res. Lines Lost in Each MSA (per Brigham/Teitzel Table 1	(B) Res. Lines Disconnected I/C/W DSL Addition	(B/A) % of Res. Line Loss Attributable to DSL Conversion
Denver			
Minneapolis			
Phoenix			
Seattle			

-----End Confidential-----

In each MSA, if the residential line "DSL conversions" shown in Column B in the above table were removed from the total retail residential line loss values shown in Confidential Table 1 of the four Brigham/Teitzel declarations, the total residential line loss percentages shown for each MSA over the 2000 to 2006 timeframe would be reduced \*\*\*\*\*begin confidential\*\*\*,

\*\*\*end confidential\*\*\*. Clearly, the effect of DSL/additional line conversions on Qwest's overall residential access line loss in the four MSAs has been negligible,<sup>142</sup> since the overwhelming volume of DSL installations have been associated with broadband Internet addition to existing services rather than as a substitute for additional lines.

<sup>142</sup> The Denver data are not inconsistent with the Colorado OCC's survey results, which showed that only five percent of survey respondents in the state of Colorado had replaced a secondary line. Colorado OCC Exhibit 2 at 10-11.

**B. There Is Extensive Competition For Enterprise Customers In Each Of The Four MSAs**

**1. Cable**

Qwest has shown that the cable providers in each MSA have facilities capable of delivering enterprise telecommunications services.<sup>143</sup> Comcast states that Qwest has overstated Comcast's presence in the business market, and that Comcast "has not, to date, made any significant or sustained entry into the business market."<sup>144</sup> While Comcast may be trailing Cox in penetrating the business market, it should soon catch up. In fact, Comcast has announced it will spend over \$250 million in 2007 and \$3 billion over five years to serve the business marketplace.<sup>145</sup> While Comcast is a relatively new entrant into the market for business services, there no question that it represents a formidable competitor to Qwest for business customers in the near and long term. Comcast's intent is to initially focus on small to medium businesses with under 20 employees.<sup>146</sup> Comcast's network can easily be linked to "many, many" small and

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<sup>143</sup> Denver forbearance petition at 6-9, 21-22; Seattle forbearance petition at 6-9, 21-22; Minneapolis forbearance petition at 6-9, 22-23; Phoenix forbearance petition at 6-9, 21-23. The Commission should reject suggestions that it sub-segment the business market. *See, e.g.* Arizona at 14. While carriers may target their services towards different categories of customers, the Commission has traditionally divided interstate services into the mass market (residential consumers and small business customers) and the enterprise market (medium-sized and large business customers). It would be counterproductive for the Commission to try to mimic carriers' marketing categories, because carriers do not use consistent definitions when defining their target customer. Some carriers, like Cox, serve the entire enterprise market. While others, like McLeod serve only a portion of the enterprise market, in McLeod's case the low end of the enterprise market.

<sup>144</sup> Comcast at 6.

<sup>145</sup> Presentation at Merrill Lynch U.S. Media Conference (June 7, 2007) slide 15 [http://library.corporate-ir.net/library/11/118/118591/items/248567/Comcast\\_MerrillLynch2.pdf](http://library.corporate-ir.net/library/11/118/118591/items/248567/Comcast_MerrillLynch2.pdf) (visited October 1, 2007).

<sup>146</sup> *Id.* at slide 14.

midsize businesses, according to Stephen Burke, Comcast's chief operating officer.<sup>147</sup> With five million such businesses in its national footprint.<sup>148</sup> Comcast has already introduced its Work Place Digital Voice product. According to a July 16, 2007 press release, this suite of high-speed Internet, cable and digital voice services that is "now available across the Twin Cities metro area."<sup>149</sup>

Others argue that cable cannot compete in the enterprise business market.<sup>150</sup> For example, Covad, *et al.* claims that:

- Qwest fails to demonstrate that cable competitors are able -- or will be able within a commercially reasonable period of time -- to adequately serve such customers.<sup>151</sup>
- Qwest offers no evidence that cable companies are providing extensive facilities-based telephony services to enterprise customers today.<sup>152</sup>
- Suggestions by Qwest in its forbearance petitions that cable operators provide a significant competitive threat in the enterprise market remains more fantasy than reality.<sup>153</sup>
- Existing cable technology does not yet support the provision of reliable, economic, or large scale services at a DS1 level to enterprise customers, primarily because of timing/clocking and upstream bandwidth problems.<sup>154</sup>

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<sup>147</sup> See: <http://biz.yahoo.com/ibd/070924/general.html?v=1&printer=1> (visited September 28, 2007).

<sup>148</sup> Merrill Lynch U.S. Media Conference (June 7, 2007) slide 14.

<sup>149</sup> *Comcast Expands Services for Twin Cities Business Owners*, Press Release, July 16, 2007.

<sup>150</sup> Covad at 28-30; Affinity at 34-35.

<sup>151</sup> Covad at 28.

<sup>152</sup> *Id.* at 29.

<sup>153</sup> *Id.* at 30.

<sup>154</sup> *Id.*



In similar fashion, BT Americas states that there is "far too little bandwidth" in the cable industry and that "the enterprise market is likely to remain largely ignored by cable in the near term."<sup>155</sup>

Despite these unsubstantiated claims, Cox provides service to "businesses of every size" throughout the Phoenix market.<sup>156</sup> In fact, the Cox web site lists numerous business services available to Phoenix customers, and the description includes a notation as to whether each service is designed for the small, medium or large business market.<sup>157</sup> Cox offers services targeted to each business segment, with everything from standard digital voice to private line services at bandwidths from DS1 and DS3 all the way to OC192.<sup>158</sup> As Qwest pointed out in its petition, Cox also offers Optical Internet and Transparent LAN services. According to analysts Cox, "already has 30% of the business market in Phoenix."<sup>159</sup>

In sum, the cable providers have had strong success in the mass market,<sup>160</sup> and are now actively providing enterprise services. These providers have the technical expertise, economies of scale and scope, sunk investments in network infrastructure,<sup>161</sup> and established presence in

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<sup>155</sup> BT Americas at 10.

<sup>156</sup> See Phoenix Brigham/Teitzel Declaration, Exhibit 1, page 23.

<sup>157</sup> See *id.* pages 23-25.

<sup>158</sup> See: [http://www.coxbusiness.com/pdfs/CBS40200-PrvtLn\\_DS0605.pdf](http://www.coxbusiness.com/pdfs/CBS40200-PrvtLn_DS0605.pdf) (visited September 28, 2007).

<sup>159</sup> See: <http://biz.yahoo.com/ibd/070924/general.html?v=1&printer=1> (visited September 28, 2007).

<sup>160</sup> Denver forbearance petition at 5-6 and Denver Brigham/Teitzel Declaration ¶ 18; Seattle forbearance petition at 5-6 and Seattle Brigham/Teitzel Declaration ¶ 18; Minneapolis forbearance petition at 5-6 and Minneapolis Brigham/Teitzel Declaration ¶ 18; Phoenix forbearance petition at 5-6 and Phoenix Brigham/Teitzel Declaration ¶ 17.

<sup>161</sup> Denver forbearance petition at 8-9 and Denver Brigham/Teitzel Declaration ¶ 18; Seattle forbearance petition at 9 and Seattle Brigham/Teitzel Declaration ¶ 18; Minneapolis forbearance